Criminal Law Practitioner

Volume 4 | Issue 6 Article 3

2019

Nolo Contendere Convictions: The Effect of No Confession in Future Criminal Proceedings

Ramy Simpson
Miami-Dade State Attorney's Office

Follow this and additional works at: https://digitalcommons.wcl.american.edu/clp

 Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

Simpson, Ramy (2019) "*Nolo Contendere* Convictions: The Effect of No Confession in Future Criminal Proceedings," *Criminal Law Practitioner*: Vol. 4 : Iss. 6 , Article 3.
Available at: https://digitalcommons.wcl.american.edu/clp/vol4/iss6/3

This Article is brought to you for free and open access by Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Criminal Law Practitioner by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

Nolo Contendere Convictions: The Effect of No Confession in Future Criminal Proceedings

Ramy Simpson

I. Introduction

It is well established that evidence of a defendant's prior convictions can significantly impact the outcome of a criminal trial.[1] Therefore, society has an interest in ensuring that the conviction reliably proves that the defendant committed the prior crime. When courts admit convictions into evidence for purposes allowed by the Federal Rules of Evidence or applicable state rules, the rationale behind their use is that the convictions are reliable and trustworthy.[2] This rationale is also why there is a hearsay exception for admitting them into evidence.[3] However, does the notion that guilt is certain differ based on whether the conviction is the result of a trial, a guilty plea, or a *nolo contendere* plea? Courts have not wavered in holding that for the purposes of the legal proceeding, a conviction based on a trial or a guilty plea is sufficient to prove that the defendant committed the prior act.[4] However, when a defendant pleads *nolo contendere*, commonly known as "no contest," the defendant does not expressly admit guilt, and the judge is not procedurally required to determine whether there is a factual basis for the charge.[5] Is the defendant's guilt here as certain as a conviction based on a trial or guilty plea? Courts have differed on whether the government can proffer records of *nolo contendere* convictions (hereinafter "*nolo* convictions") under Federal Rule of Evidence 404(b) as evidence of prior bad acts.[6] This comment argues that the guilt is less certain, and that because of the lesser degree of certainty, the history of *nolo contendere* pleas, and the construction of the Federal Rules of Evidence, records of *nolo* convictions cannot be used to prove prior bad acts under Rule 404(b). Instead, the government must proffer evidence of the facts underlying the *nolo* conviction to prove matters under 404(b).

---

1 *E.g.*, L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. Davis L. Rev. 615, 651-52 (2001); Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L. Rev. 1, 38 (1999) (citing Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 L. & Hum. Behav. 37, 47 (1985)); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 Emory L.J. 135, 174 (1989) ("The assumption that a defendant can be afforded a fair trial under these conditions is dangerously wrong. The Supreme Court has recognized that serious matters of prejudice cannot be cured by judicial admonition to the jury." (citing Bruton v. United States, 391 U.S. 123, 125-26 (1968)).

2 Anna Robert, *Impeachment by Unreliable Conviction*, 55 B.C. L. Rev. 563, 580 (2014).

3 Hiroshi Motomura, *Using Judgments As Evidence*, 70 Minn. L. Rev. 979, 988-89 (1986).

4 *E.g.*, *United States v. Green*, 873 F.3d 846, 865 (11th Cir. 2017) (en banc); *United States v. Frederickson*, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

5 *Infra* Section II(A), (A)(2).

6 The law is clear that the government can proffer records of *nolo* convictions for impeachment purposes and when a conviction is an element of the crime the defendant is currently charged with, such as the charge of "Felon in Possession of a Firearm." Therefore, this comment will not take a position on the use of *nolo* convictions for those purposes.

Published by Digital Commons @ American University Washington College of Law, 2018

II. Background

Federal Rule of Evidence 404(b)(2) allows proof of prior bad acts if the evidence is used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[7] This includes evidence of crimes that the defendant was not charged with.[8]

For a federal court to admit evidence of prior bad acts, the judge needs to make a preliminary determination under Rule 104(a).[9] The judge must determine that "the jury can reasonably conclude that the act occurred and that the defendant was the actor" before allowing the government to use the evidence.[10] This is a modest standard that the government can meet with a certified record of a conviction based on a trial or guilty plea, even without any other evidence accompanying the record.[11] However, courts differ on whether a record of a *nolo* conviction can be admitted under 404(b) when considering other provisions of the Federal Rules of Evidence and what a defendant admits when pleading *nolo*.[12]

A. An Overview of *Nolo Contendere* Pleas

It is not entirely certain what a defendant admits when pleading *nolo contendere*. In *Lott v. United States*, decided in 1961, the Supreme Court held that a defendant who pleads *nolo* is implicitly admitting "every essential element of the offense that is well pleaded in the charge,"[13] and that it "is tantamount to 'an admission of guilt for the purposes of the case.'"[14] In *United States v. Alford*,[15] decided nine years after *Lott*, the Supreme Court hedged on the notion that a *nolo* plea is an admission of guilt. The Court asserted that "it is impossible to state precisely what a defendant does admit when he enters a *nolo* plea in a way that will consistently fit all the cases."[16] The Court then explained that historically, the plea has not been treated as an "express admission of guilt," but rather as the defendant simply not contesting the charges and agreeing to be punished as if he or she were guilty.[17]

Alford did not overrule *Lott* because its analysis on the issue was dictum and it did not cite *Lott* in its analysis of the *nolo* plea. However, *Alford's* assertion that it is uncertain what a defendant admits when pleading *nolo* was highly influential in lower court holdings that a *nolo* conviction cannot be used in subsequent criminal proceedings to prove that the defendant committed the prior crime.[18] Not surprisingly, the Circuit that held that *nolo* convictions can be used in subsequent criminal proceedings for this purpose cited *Lott* in

---

7 Fed. R. Evid. 404(b)(2).

8 *E.g.*, *United States v. Ford*, 784 F.3d 1386, 1393-94 (2015); *United States v. Green*, 617 F.3d 233, 249-50 (3d Cir. 2010); *see* Fed. R. Evid. 404 advisory committees' note to 2000 amendments.

9 *Huddleston v. United States*, 485 U.S. 681, 689 (1988) (citation omitted).

10 *Id.*

11 *E.g.*, *United States v. Green*, 873 F.3d 846, 865 (11th Cir. 2017) (en banc); *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997); *United States v. Arambula–Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993).

12 *See infra* Section II(B).

13 367 U.S. 421, 426 (1961) (quoting *United States v. Lair*, 195 F. 47, 52 (8th Cir. 1912)) (internal quotation marks removed).

14 *Id.* (quoting *United States v. Hudson*, 272 U.S. 451, 455 (1927)).

15 400 U.S. 25 (1970).

16 *Id.* at 35 n.8. *Alford* is best known for holding that a defendant may plead guilty even while adamantly declaring innocence if the evidence against the defendant is strong and he pleads guilty at the advice of his counsel to avoid the uncertainty of a sentence after trial. *Id.* at 38. This opinion created the "*Alford* plea." The Court discussed *nolo* pleas to show that that Constitution allows defendants to accept punishment without expressly admitting guilt if going to trial would likely result in worse consequences. *Id.* at 35.

17 *Id.*

18 *See infra* Section II(B).

its analysis.[19] The range in interpretations of what defendants admit when pleading *nolo* has contributed to the circuit split on whether the resulting convictions are admissible to prove the defendant committed the prior crime.

1. How the Nolo Contendere Plea Originated

English common law inspired the use of *nolo contendere* pleas in the American legal system.[20] The Supreme Court has even suggested that the plea originated as an early medieval practice where defendants would request to end the criminal case by offering to pay the King money.[21] When defendants sought this compromise, they did not have to admit guilt.[22] They only had to submit to the King's mercy and ask for a fine.[23] According to an early 19th century treatise, early English law considered this an "implied confession":

> An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine: in which case, if the court think fit to accept of such submission . . . without putting him to a direct confession, or plea (which in some cases seems to be left to discretion), the defendant shall [a] not be estopped to plead not guilty to an action for the same fact, as he shall [b] be where the entry is *quod cognovit indictamentum*."[24]

In English common law, the court entered a judgment of *quod cognovit indictamentum* after a defendant expressly confessed to the crime, making *quod cognovit indictamentum* the equivalent of a guilty verdict in the United States today.[25] This passage shows that defendants who implicitly confessed by submitting to the King's mercy were allowed to plead not guilty in subsequent proceedings that arose from the same occurrence, but those who expressly confessed were forced to plead guilty in those future proceedings.[26] Thus, the King provided protections that accompanied "implied confessions," but these protections were unavailable for "express confessions."[27] This philosophy of leniency extended to American courts in the eighteenth and nineteenth century, which believed that *nolo* convictions could not "rightly be used against [the defendant] in any other case."[28]

[19] *United States v. Frederickson*, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).
[20] *See Alford*, 400 U.S. at 35 n.8 (citing old English authorities when explaining how the *nolo contendere* plea originated).
[21] *Id.*; *see* 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1d Ed. 1899) (explaining that English judges could "pronounce a sentence of imprisonment and then allow the culprit to 'make fine,' that is to make an end (finem facere) of the matter by paying or finding security for a certain sum of money.").
[22] *Alford*, 400 U.S. at 35 n.8 (citing Anon., Y.B.Hil., 9 Hen. 6, f. 59, pl. 8 (1431)).
[23] *Id.*
[24] 2 WILLIAM HAWKINS, PLEAS OF THE CROWN; OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS 466 (8th ed. 1824).
[25] *Id.* (explaining that an express confession "carries with it so strong a presumption of guilt that an entry on record, '*quod cognovit indictamentum,*' etc., in an indictment of trespass estops the defendant to plead 'not guilty' to an action brought afterwards against him for the same matter.").
[26] *Id.*
[27] *Id.*
[28] *United States v. Lair*, 195 F. 47, 52 (8th Cir. 1912) (citing *United States v. Hartwell*, 26 F. Cas. 196, 201 (D. Mass. 1869); *Commonwealth v. Horton*, 26 Mass. 206 (1 Pick.) (1829)).

Published by Digital Commons @ American University Washington College of Law, 2018

2. The Procedural Differences Between Nolo Pleas and Guilty Pleas

There are three major procedural differences between *nolo* pleas and guilty pleas, which help explain why *nolo* convictions should be treated differently in future litigation. First, Federal Rule of Criminal Procedure 11(b)(3) requires that the judge inquire into the factual basis for a guilty plea before accepting it. The advisory committee notes explain that the inquiry is meant to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." [29] However, when accepting a *nolo* plea, the judge does not have to extend this protection to the defendant because Rule 11(b)(3) purposefully omits *nolo* pleas from requiring a factual inquiry.[30] Thus, a defendant who pleads *nolo* can theoretically be convicted of a crime outside the range of his conduct.

Second, Federal Rule of Evidence 410 allows evidence of a defendant's guilty plea if it becomes relevant in future litigation unless the defendant withdrew the plea.[31] This means that evidence of the plea is allowed when it results in a conviction. However, Rule 410 expressly bans evidence of *nolo* pleas, regardless of whether they were withdrawn, in future litigation with the same defendant.[32] Therefore, evidence of a *nolo* plea is not admissible even when the plea results in a conviction, which is inevitable unless the defendant withdraws the plea or the court rejects it.[33] It is generally accepted that this ban extends to convictions based on a *nolo* plea in a civil proceeding arising out of the same facts.[34] However, there is uncertainty over whether the inevitable resulting conviction from the plea is inadmissible against the defendant in another criminal case.[35]

Third, Federal Rule of Evidence Rule 803(22), a hearsay exception, states that felony convictions based on guilty pleas are a hearsay exception, but explicitly adds that convictions based on *nolo* pleas are not an exception.[36] These differences indicate that there was a clear congressional intent to treat *nolo* convictions differently from guilty convictions in future proceedings.

B. The Circuit Split

The Eighth Circuit was the first Court of Appeals to answer whether a record of a *nolo* conviction is admissible under Rule 404(b) as evidence of prior bad acts.[37] In *United States v. Frederickson*, the defendant was convicted for

[29] Fed. R. Crim. P. 11 advisory committees' note to 1966 amendments.

[30] *Id.* ("For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of *nolo contendere* without inquiry into the factual basis for the plea. The [factual inquiry] is not, therefore, made applicable to pleas of *nolo contendere*.").

[31] Fed. R. Evid. 410(a)(1).

[32] *Id.* 410(a)(2); *see* Roger C. Park et al., Evidence Law: A Student's Guide to the Law of Evidence as Applied to American Trials 229 (3d. 2011) ("[I]n many cases the most compelling motivation to utilize the *nolo contendere* plea is precisely to dispose of the case without creating adverse evidence for subsequent civil or criminal litigation.").

[33] *See* Fed. R. Crim. P. 11(c)(5)-(d).

[34] *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th. Cir. 1988) ("Rule 410 was intended to protect a criminal defendant's use of the *nolo contendere* plea to defend himself from future civil liability."); Colin Miller, Evidence: Plea & Plea Related Statements (Rule 410) 8 (2013); David L. Shapiro, *Should a Guilty Plea Have a Preclusive Effect?*, 70 Iowa L. Rev. 27, 36 (1984) ("[T]he nolo plea has no effect in a later civil suit." (quoting 2 L. Orfield, Criminal Procedure Under The Federal Rules § 11:14 (1966))).

[35] *See* Miller, *supra* note 34, at 12-13 (explaining that courts are "split over whether Rule 410(a)(2) solely precludes the admission of the *nolo contendere* plea itself or whether it also precludes admission of the resulting conviction.").

[36] Fed. R. Evid. 803(22)(A).

[37] *United States v. Frederickson*, 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

three counts of knowingly and willfully making threats to harm the President.[38] Given that the defendant's intent when making the threats was at issue, the trial court admitted the defendant's prior *nolo* conviction for making a false bomb threat under Rule 404(b) to prove his intent in the current case.[39] On appeal, the Eighth Circuit held that the *nolo* conviction was admissible.[40] Quoting the Supreme Court in *Lott*, it reasoned that there is no basis for distinguishing between guilty convictions and *nolo* convictions for purposes of admissibility under 404(b) because a defendant who pleaded *nolo* to a prior crime admitted "every essential element of the offense."[41] However, the court did not discuss the statutory distinctions between guilty pleas and *nolo* pleas nor the propriety of using *nolo* convictions in future proceedings.

In 2006, the Ninth Circuit inquired about the admissibility of *nolo* convictions in *United States v. Nguyen*.[42] However, the question before the court was not whether the convictions are admissible under 404(b), but more broadly whether they are admissible to prove that the defendant actually committed a prior crime.[43] In *Nguyen*, the defendant was convicted for "willful failure to comply with terms of release under supervision."[44] The term the defendant allegedly violated stated that the defendant must not "commit any crimes" while on release, and the defendant was convicted of violating this term based solely on two misdemeanors to which he pleaded *nolo contendere*.[45] Citing *Alford*, the Ninth Circuit explained that a *nolo* plea "is, first and foremost, not an admission of factual guilt."[46] It determined that this contributed to *nolo* pleas being a less reliable indicator of actual guilt than a guilty plea.[47]

With this as its guiding philosophy, the Ninth Circuit held that Federal Rule of Evidence 410, which explicitly prohibited evidence of *nolo* pleas, also prohibited "the convictions resulting from them as proof that the pleader actually committed the underlying crimes charged."[48] It explained that allowing the convictions resulting from the pleas, but not the pleas themselves, would produce an irrational result.[49] The court elaborated by stating that "Rule 410's exclusion of a *nolo contendere* plea would be meaningless if all it took to prove that the defendant committed the crime charged was a certified copy of the inevitable judgment of conviction resulting from the plea."[50]

Additionally, the court held that *nolo* convictions are also barred under a Federal Rule of Evidence hearsay exception, 803(22), which includes felony guilty judgments in the exception but expressly excludes judgments based on *nolo* pleas.[51] However, the court did hold that records of convictions could be admissible under 803(8), the public records hearsay exception, to prove the *mens rea* of a defendant accused of a subsequent crime under 404(b), but it still reversed the defendant's conviction because the evidence was not proffered for that reason.[52] The court's holding suggests

[38] *Id.* at 1360.
[39] *Id.* at 1364.
[40] *Id.* at 1365 n.10.
[41] *Id.* (quoting *Lott v. United States*, 367 U.S. 421, 426 (1961)).
[42] 465 F.3d 1128 (9th Cir. 2006).
[43] *Id.* at 1129.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 1130.
[47] *Id.* (citing *Olsen v. Correiro*, 189 F.3d 52, 60 n.8 (1st. Cir. 1999)).
[48] *Id.* at 1131.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 1131-32; *see* Fed R. Evid. 803(22) (Stating that the following is a hearsay exception: "[e]vidence of a final judgment of conviction if: (A) the judgment was entered after a trial or guilty plea, but not a *nolo contendere* plea.").
[52] *Nguyen*, 465 F.3d at 1132.

that the Ninth Circuit believes that admitting a prior conviction under Rule 404(b) to prove a defendant's knowledge or intent in a subsequent crime is distinguishable from using the evidence to prove the defendant was guilty of the prior crime.

Finally, in 2017, the Eleventh Circuit issued an en banc ruling on the matter in *United States v. Green*.[53] In *Green*, the defendant was convicted of "being a felon in possession of a firearm or ammunition."[54] The district court admitted evidence of the defendant's prior 2006 conviction from a *nolo* plea "for being a felon in possession of a firearm, ammunition, or an electric weapon" as evidence of prior bad acts under Rule 404(b).[55] The government intended to use the evidence to help prove that the defendant had the intent to possess a firearm on this occasion.[56] The judge instructed the jury that the evidence could only be used to assess whether the defendant had the required mental state for the charge he is currently facing.[57]

In a thoughtful opinion where the court analyzed both the *Frederickson* and *Nguyen* opinions, discussed the policy implications, and detailed the differences between pleas and convictions, the court held that Federal Rule of Evidence 803(22) barred records of *nolo* convictions from being admissible to prove matters under Rule 404(b).[58] It explained that admitting the *nolo* conviction under 404(b) was erroneous because it was used to indicate that the defendant committed the prior crime, and thus, the *nolo* conviction was not admissible under 404(b).[59] The court elaborated by stating that the government should have presented evidence of the underlying facts of the conviction—that the "Defendant so possessed ammunition on the date in question."[60]

However, it limited its ruling to Rule 803(22) because it determined that Rule 410 was "an uncertain basis on which to rest a determination that a nolo conviction is not admissible."[61] The court reasoned that the plain language of the Rule only excluded *nolo* pleas, and that because *nolo* convictions were commonly used to prove the fact of conviction,[62] this counseled "against a reading that Rule 410 contains an absolute prohibition on the use of nolo convictions."[63] The court did not rely on either *Lott* or *Alford* in its holding.

Frederickson, *Nguyen*, and *Green* are the only three federal circuit court cases where the answer to whether *nolo* convictions are admissible as proof the defendant committed the prior crime was central to their holdings. In *Olsen v. Corriero*, the First Circuit recognized the problems with not interpreting Rule 410's ban on nolo contendere pleas to encompass the resulting convictions when the government proffers the evidence to prove the defendant committed a prior crime.[64] However, it stopped short of holding that Rule 410 applies to the resulting convictions because the court did not have to answer that question.[65]

53 873 F.3d 846 (11th Cir. 2017).
54 *Id.* at 850.
55 *Id.* at 857
56 *Id.* at 868.
57 *Id.* at 851.
58 *Id.* at 861-63, 866.
59 *Id.* at 866.
60 *Id.*
61 *Id.* at 865.
62 An example of this would be using a *nolo* conviction to prove that a defendant was a felon in possession of a firearm, rather than using it to prove that the defendant in fact committed the crime that made him a felon.
63 873 F.3d at 865.
64 189 F.3d 52, 60 (1st Cir. 1999) ("If such convictions and sentences were offered for the purpose of demonstrating that the pleader is guilty of the crime pled to, then the nolo plea would in effect be used as an admission and the purposes of Rule 410 would be undermined.").
65 *Id.* at 62 ("Accordingly, there is no reason here to expand Rule 410 beyond the scope of its plain language, which in relevant part encompasses only nolo pleas." (citation omitted)).

Additionally, in *United States v. Adedoyin*,[66] the Third Circuit suggested that Rules 410 and 803(22) barred the use of *nolo* convictions to prove that the defendant actually committed the prior crime,[67] which is congruent with the holdings in *Nguyen* and *Green*. Both the courts in *Olsen* and *Adedoyin* only had to answer whether the defendant's prior *nolo* conviction could be used to prove that the defendant had been convicted in the past, not whether the defendant actually committed the crime he was charged with.[68] Both courts held that the convictions could be admitted to prove the fact of conviction, if that is an essential element to the crime.[69]

III. Analysis

A. The Key Statutory Distinctions between *Nolo Contendere* Pleas and Guilty Pleas and the Legislative History of the Federal Rules of Evidence

Federal Rule of Criminal Procedure 11 provides for a key difference between guilty pleas and *nolo* pleas that helps show that a *nolo* plea is not tantamount to a guilty plea.[70] The difference is that if a defendant pleads guilty, the court must determine that there is a factual basis for the plea.[71] The court must ensure that "the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty."[72] However, if the defendant pleads *nolo*, then the court does not need to make a factual inquiry into whether the defendant's conduct corresponds with the charge.[73] This means that if the defendant is charged with the wrong crime, or if the facts are more congruent with a lesser charge, the rules allow the court to convict the defendant anyway because it is within the court's discretion whether to review the facts. Therefore, even if it is unlikely that the judge will not make a factual inquiry into the basis for the charge, courts must be cautious when evaluating the reliability of a *nolo* conviction in future proceedings as a procedural matter.

Federal Rule of Evidence 410 provides a second key difference between guilty pleas and *nolo* pleas. It states that for a guilty plea to be inadmissible against a defendant in a subsequent case, the defendant needs to withdraw the guilty plea.[74] However, the defendant's *nolo* plea is inadmissible even if the defendant does not withdraw it, and thus, even when it leads to a conviction.[75] Therefore, to allow evidence of the conviction that inevitably results from the plea would seemingly undermine any intended benefits that would come with prohibiting evidence of the plea. As the Ninth Circuit stated in *Nguyen*, construing Rule 410 to permit *nolo* convictions would produce an "illogical result" and would make Rule 410's prohibition on *nolo* pleas meaningless.[76]

A third distinction is that Federal Rule of Evidence 803(22) makes evidence of a guilty conviction a hearsay exception, but explicitly states that *nolo contendere* convictions are not

[66] 369 F.3d 337 (3d Cir. 2004).
[67] Id. at 344 ("It is true that a plea of nolo contendere is not an admission of guilt and thus the fact that a defendant made such a plea cannot be used to demonstrate that he was guilty of the crime in question." (citing *Olsen*, 189 F.3d at 60)).
[68] *Adedoyin*, 369 F.3d at 345; *Olsen*, 189 F.3d at 62.
[69] *Adedoyin*, 369 F.3d at 344; *Olsen*, 189 F.3d at 61-62.
[70] Fed. R. Crim. P. 11.
[71] *Id.* 11(b)(3).
[72] *Id.* advisory committees' note to 1966 amendments.
[73] *Id.*
[74] Fed. R. Evid. 410(a)(1).
[75] *Id.* 410(a)(2).
[76] *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006).

a hearsay exception. This is an important distinction based on the notion that "an implied confession of guilt cannot rise to the degree of certainty which would make it the equivalent of an express confession."[77] The differences prescribed in the Federal Rules of Criminal Procedure and the Federal Rules of Evidence suggest that a guilty plea is more serious, and more indicative of guilt, than a *nolo* plea.

Furthermore, the legislative history of the Federal Rules of Evidence discusses *nolo* pleas, albeit briefly, and it leans towards an interpretation that the convictions are barred under Rules 410 and 803(22).[78] The advisory committee that drafted the Federal Rules of Evidence supported Rule 803(22) by stating that convictions based on *nolo* contendere pleas were not included because "[t]his position is consistent with the treatment of nolo pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof."[79] Thus, the advisory committee drafted Rules 410 and 803(22) with the intention that the *nolo* convictions would be inadmissible, and Congress accepted the proposed rules without altering this.[80] The court in *Nguyen* used this language as a basis for holding that *nolo* convictions are inadmissible under Rules 410 and 803(22) to prove that the defendant committed the prior bad act.[81]

The statutory distinctions and legislative history are congruent with what American courts held in the 18th and early 19th Century: that *nolo* convictions could not "rightly be used against [the defendant] in any other case."[82] It is well recognized in the United States that a *nolo* conviction cannot be used against the defendant in a civil proceeding arising from the same occurrence, and that guilt in the civil case will be litigated.[83] Therefore, there is no reason why this same rule should not apply when the government proffers the evidence in a criminal case to prove that the defendant committed a prior crime. As in a civil case, evidence proving the facts underlying the conviction should be admissible in a criminal case, but the record of the conviction should not be admissible.

B. Where the Courts Were Correct and Where They Went Awry

The Eighth Circuit in *Frederickson* erred in holding that *nolo* convictions are admissible under 404(b) as evidence of prior bad acts.[84] The court only considered the Supreme Court's holding in *Lott*, that a defendant who pleads *nolo* admits "every essential element of the offense (that is) well pleaded in the charge," when holding this way.[85] However, the court should have considered the history of *nolo* pleas and the statutory protections provided for those in future proceedings who pleaded *nolo* to a prior charge. The history of *nolo* pleas and statutory

[77] Nathan B. Lenvin & Ernest S. Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L. J. 1255, 1258 (discussing why *nolo contendere* pleas cannot be used for capital crimes (quoting *Commonwealth v. Shrope*, 264 Pa. 246, 250, 107 Atl. 729, 730 (1919))) (internal quotation marks omitted); *See Nguyen*, 465 F.3d at 1131 (citation omitted); *Olsen v. Correiro*, 189 F.3d 52, 60 (1st. Cir. 1999).

[78] H.R. DOC NO. 93-46, at 140 (1978).

[79] *Id.*

[80] *Id.*

[81] 465 F.3d 1128, 1131-32 (9th Cir. 2006).

[82] *United States v. Lair*, 195 F. 47, 52 (8th Cir. 1912) (citing *United States v. Hartwell*, 26 F. Cas. 196, 201 (D. Mass. 1869); *Commonwealth v. Horton*, 26 Mass. 206 (1 Pick.) (1829)).

[83] *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th. Cir. 1988) ("Rule 410 was intended to protect a criminal defendant's use of the *nolo contendere* plea to defend himself from future civil liability."); MILLER, *supra* note 34, at 8; David L. Shapiro, *Should a Guilty Plea Have a Preclusive Effect?*, 70 IOWA L. REV. 27, 36 (1984) ("[T]he *nolo* plea has no effect in a later civil suit." (quoting 2 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 11:14 (1966))).

[84] 601 F.2d 1358, 1365 n.10 (8th Cir. 1979).

[85] *Id.* (alteration in original) (quoting *Lott v. United States*, 367 U.S. 421, 426 (1961)).

protections should have been the basis of the court's analysis because they reflect the common law and congressional intent better than a sole inquiry into what a defendant admits when pleading guilty.

Additionally, the court's explanation of what a defendant admits when pleading *nolo* is debatable because the Supreme Court in *United States v. Alford* explained in dictum that "it is impossible to state precisely what a defendant does admit" when doing so.[86] Furthermore, even if a court determines it is bound by *Lott* rather *Alford* on the issue and that this is an adequate legal basis for determining whether *nolo* convictions are admissible under 404(b), it should still hold that the convictions are not admissible because *Lott* made clear that the plea was an admission of guilt "for the purposes of the case."[87] The plea would only act as an admission for the purposes of the case because at common law, the conviction could not be used against the defendant in any subsequent proceeding.[88] Therefore, even if a court follows *Lott's* determination of what a defendant admits, the court should not allow a *nolo* conviction to be admitted under 404(b) because that would be using the conviction against the defendant in a future proceeding.

The Eleventh Circuit in *Green* considered the statutory protections and interpreted the law correctly when it held that *nolo* convictions are not admissible under 404(b) to prove the defendant's guilt of the prior crime.[89] It held that 803(22) was the only basis for this, and not Rule 410.[90] However, courts should interpret both Rules 410 and 803(22) as barring *nolo* convictions from evidence to prove guilt. The legislative history of the Federal Rules of Evidence explains that the advisory committee intentionally did not include *nolo* convictions as a hearsay exception under Rule 803(22) so that the Rule was consistent with Rule 410's "treatment of *nolo* pleas."[91] This legislative history should have remedied the court's concern that the plain language of the Rule only prohibits the admission of *nolo* pleas. Additionally, the court's argument that Rule 410 cannot act as an absolute prohibition on *nolo* convictions because courts have allowed their use to prove the fact of conviction[92] does not mean that Rule 410 theoretically could allow *nolo* convictions to be used to prove the defendant committed the prior crime. Proving the fact of conviction has been distinguished from proving actual guilt because records of a *nolo* conviction have been considered reliable enough to prove the defendant was convicted, and courts have construed certain federal statutes to allow *nolo* convictions to prove the fact of conviction.[93]

[86] 400 U.S. 25, 35 n.8 (1970).

[87] *Lott*, 367 U.S. at 426 (quoting *Hudson v. United States*, 272 U.S. 451, 455 (1926)) (internal quotation marks removed).

[88] *Hudson*, 272 U.S. at 455 (describing how at common law, a defendant who pleaded *nolo* can plead not guilty in any other case brought against the defendant) (citation omitted); *United States v. Lair*, 195 F. 47, 52 (1906) (explaining that even though a defendant who pleads *nolo* admits to every essential element of the crime, "the conviction cannot rightly be used against him in any other case. Such is the effect of the plea of nolo contendere.") (citations omitted); Leonard W. Levy & Kenneth L. Karst, Encyclopedia of the American Constitution 1820 (2d ed. 2000) ("Of the same immediate effect as a guilty plea, [a *nolo* plea] admits the facts charged but cannot be used as a confession of guilty in any other proceeding."); *see supra* II.A.1.

[89] 873 F.3d 846, 866 (11th Cir. 2017) (en banc).

[90] *Id.* at 865.

[91] H.R. Doc No. 93-46, at 140 (1978).

[92] 873 F.3d at 865.

[93] *See United States v. Adedoyin*, 369 F.3d 337, 344 (3rd Cir. 2004) (quoting Pearce v. United States Dep't of Justice, 836 F.2d 1028, 1029 (6th Cir.1988) ("Notwithstanding Rule 410, a conviction pursuant to a nolo contendere plea is a conviction within the meaning of [21 U.S.C. § 824] and gives rise to a variety of collateral consequences in subsequent proceedings.")); *Olsen v. Correiro*, 189 F.3d 52, 61 (1st. Cir. 1999) (quoting Fed.R.Crim.P. 11(e)(6) advisory committee's notes, 1974 amendment ("A judgment upon the plea is a conviction and may be used to apply multiple offender statutes.")).

Published by Digital Commons @ American University Washington College of Law, 2018

Therefore, the Eleventh Circuit should have held that both Rules barred records of *nolo* convictions to prove matters under 404(b). The First Circuit in *Olsen* and the Third Circuit in *Adedoyin* were correct to distinguish between the use of *nolo* convictions to prove the fact of conviction and their use to prove the defendant's guilt of the underlying facts that led to the conviction.[94] Those circuits were correct to assert, although in dicta, that Rule 410 prohibited the use of *nolo* convictions to prove the defendant's guilt of the prior crime.[95]

The Ninth Circuit's opinion in *Nguyen* was the most puzzling compared to the other cases. The court was correct in most of the opinion when it determined that Rules 410 and 803(22) both barred evidence of *nolo* convictions to prove the defendant committed the prior crime.[96] However, it undermined its reasoning when it held that these convictions are admissible under Rule 803(8), the public records hearsay exception, to prove the defendant's mental state under Rule 404(b), such as intent or knowledge, in a subsequent criminal case.[97] The court, explicitly discussing misdemeanor convictions but also referring to *nolo* convictions, stated that these convictions "may be admissible under Rule 803(8) to prove some other element of a subsequently charged crime, but they are not admissible to prove that the defendant actually committed the underlying crimes charged. . . ."[98]

In justifying this, the Ninth Circuit cited *United States v. Loera*, which was a case where the court admitted evidence of a prior conviction under 803(8) to prove the defendant's knowledge under 404(b).[99] The defendant in *Loera*, Reginald Loera, was charged with second-degree murder after driving while under the influence of alcohol and causing a traffic accident that killed someone.[100] Loera had three prior convictions in California for "driving under the influence of intoxicating liquor," and the trial judge allowed the prosecution to introduce evidence of those records to prove the malice required in second-degree murder.[101] The Ninth Circuit held that it was permissible to introduce these records under Rule 404(b).[102]

However, the Ninth Circuit in *Nguyen* and *Loera* erred in ruling that Rule 803(8) is a basis for admitting prior *nolo* convictions to prove the defendant's mental state because Rule 803(22), the hearsay exception for prior convictions, already explicitly states that *nolo* convictions are not included in the exception.[103] To use 803(8) as a basis for admitting *nolo* convictions would undermine 803(22) and make it irrelevant on the issue.[104] Even the court in *Nguyen* stated that "[a]ll judgments of conviction may be said to be public records, but the exemption under Rule 803(8) cannot be deemed to cover such judgments because it would make Rule 803(22) superfluous."[105] It appears the court determined that a *nolo* conviction is admissible as evidence to prove the defendant's mental state in a sub-

[94] *Adedoyin*, 369 F.3d at 344; *Olsen* 189 F.3d at 61.
[95] *Adedoyin*, 369 F.3d at 344; *Olsen* 189 F.3d at 60-61.
[96] 465 F.3d 1128, 1131-32 (9th Cir. 2006).
[97] *Id.* at 1132.
[98] *Id.* (citation omitted).
[99] 923 F.2d 725, 729-30 (9th Cir. 1991).
[100] United States v. Loera, 923 F.2d 725, 726-27 (1991).
[101] *Id.* at 727.
[102] *Id.* at 729.
[103] Fed. R. Evid. 802(22)(A).
[104] PARK, *supra* note 32, at 357 ("It would be peculiar to allow the broader rule, Rule 803(8), which was drafted without an eye to the problem of evidentiary use of criminal convictions, to be used as a way of getting around [the] intended limit [of Rule 803(22)]."); *see Hancock v. Dodson*, 958 F.2d 1367, 1378 n.3 (6th Cir. 1991) (holding that issues arise when other hearsay requirements are used to "avoid the requirements of Rule 803(22).").
[105] *Nguyen*, 465 F.3d at 1132.

sequent case because it is not being used to prove that the defendant actually committed the prior crime.[106] However, this logic is flawed because to use it to show that the defendant had the required *mens rea* in the subsequent case is to show that the defendant had the required *mens rea* because he or she committed the prior crime. To use the Ninth Circuit's own example in *Loera*—admitting evidence of a prior drunk driving offense to establish "the element of malice required for second degree murder, *i.e.*, that the defendant had grounds to be aware of the risk that drunk driving presented to others,"—is to show that the defendant was aware of the risks of drunk driving because he committed the prior drunk driving offense.[107] Using a *nolo* conviction to prove matters under 404(b) undermines the notion that *nolo* convictions cannot be used to prove that the defendant actually committed the prior crime.

C. The Effect This Will Have On Defendants

Disallowing the use of conviction records as proof of prior bad acts when the conviction was based on a *nolo contendere* plea will not close all avenues for the government to prove that the prior crime occurred. Federal Rule of Evidence 404(b) permits evidence of uncharged crimes as proof of prior bad acts.[108] Thus, even though a record of a *nolo* conviction is inadmissible, independent proof of the underlying facts of the crime through testimony or appropriate hearsay exceptions will be admissible under 404(b).[109]

If the government cannot proffer any independent evidence of the underlying facts that led to the conviction, then this could significantly impact a defendant's trial because studies have shown that evidence of prior convictions and bad acts has a devastating impact on a defendant's likelihood of acquittal.[110] One prominent study that Professors Roselle Wissler and Michael Saks conducted using mock jurors in a hypothetical simulation showed that the conviction rate when the jury learned of a prior crime was 75% when the crime was similar in nature, 52.5% when it was not similar, and 42.5% when it did not know about the crime.[111] If a prosecutor only has a record of a *nolo* conviction as proof that a prior crime occurred and is unable to obtain evidence of the *nolo* conviction's underlying facts, that could be the difference between a conviction and an acquittal.

[106] *Id.*

[107] *Nguyen*, 465 F.3d at 1132 (citing *Loera*, 923 F.2d at 729).

[108] *E.g.* United States v. Ford, 784 F.3d 1386, 1393-94 (2015); United States v. Green, 617 F.3d 233, 249-50 (3rd Cir. 2010); *see* Fed. R. Evid. 404 advisory committees' note to 2000 amendments ("The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b).").

[109] Fed. R. Evid. 404(b). The evidentiary standard the government must meet for the court to admit evidence of prior bad acts is whether "the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689 (1988).

[110] Dodson, *supra* note 1 (Wissler, *supra* note 1, at 47 (1985)); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 552 (1992) (citing Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235 (1975-1976)); *see also* A. N. Doob and H. M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 93 (1972) (finding in a Canadian study that on a scale from 1-7, 1 being guilty and 7 being not guilty, learning about a prior conviction brought the perception of guilt from 4 to 3). *Contra* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 506 (2011) (citation omitted) (concluding that the introduction of prior convictions only increases conviction rates by slightly more than 1%).

[111] Dodson, *supra* note 1, at 38; Antonia M. Kopeć, Comment, *They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1087-88 (2016) (citing Wissler, *supra* note 1, at 40).

IV. Conclusion

Based on the *nolo contendere* plea's origin, its history, and statutory distinctions between guilty pleas and *nolo* pleas, records of the resulting convictions should not be admissible for the purposes of proving any matter under 404(b). The records of the convictions cannot be used to prove that the defendant actually committed the prior crime. Therefore, the government instead must proffer evidence of the underlying facts that led to the *nolo* conviction to prove matters under 404(b).

About the AUTHOR

Ramy Simpson is an incoming Assistant State Attorney at the Miami-Dade State Attorney's Office. He received his J.D. from the Washington College of Law (May 2019) with Magna Cum Laude and Order of the Coif honors. His passion is criminal law, which is what his externships and studies focused on.